(2)

98-1129

NO._____

Supreme Court, U.S.
FILED
JAN 4 1999
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

DIANE SANK AND ALL OTHERS,
SIMILARLY SITUATED,
PETITIONER,

V.

THE STATE OF NEW JERSEY, ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN P. SINISI, ESQ.
SINISI & SPROVIERO
TWO SEARS DRIVE
PARAMUS, NEW JERSEY 07652
(201)599-1600

33pp

TABLE OF CONTENTS

Statement of the Case 1

Argument 9

I. REVIEW OF THIS MATTER BY THE UNITED STATES SUPREME COURT IS LIMITED TO THE CONSTITUTIONAL ISSUES, IF ANY, RAISED BY PETITIONER 9

II. PETITIONER HAS FAILED TO PROPERLY APPLY TO THIS COURT FOR AN EXTRAORDINARY WRIT, AND AS SUCH HER THIS CASE SHOULD NOT BE DEEMED AS AN APPLICATION FOR AN EXTRAORDINARY WRIT. 11

III. THE EQUITABLE DOCTRINES OF WAIVER, ESTOPPEL AND LACHES BAR PETITIONER FROM THE RELIEF SOUGHT. 13

IV. THE NEW JERSEY COURTS CORRECTLY HELD THAT RESPONDENT SHOTMEYER ACTED PURSUANT TO THE PROTOCOL PRESCRIBED IN N.J.S.A. 19:49-2, THEREBY BARRING THE RELIEF SOUGHT BY PETITIONER 15

V. PETITIONER'S RELIANCE ON THE OPEN PUBLIC MEETINGS ACT, N.J.S.A. 10:4-6, ET SEQ., IS THOROUGHLY MISPLACED AND IMPROPER, THEREBY BARRING PETITIONER'S REQUEST FOR RELIEF UNDER THE ACT. 20

VI. RESPONDENT SHOTMEYER ACTED IN ACCORDANCE WITH HIS DUTIES AS THE CAMPAIGN MANAGER FOR REPUBLICAN COUNTY-WIDE CANDIDATES, AND THEREFORE, HIS ACTIONS DID NOT CONSTITUTE AN IMPROPER ENDORSEMENT OF ANY CANDIDATE PRIOR TO THE PRIMARY ELECTION BY A POLITICAL PARTY OR COMMITTEE. 22

VII. STATUTES RELIED UPON BY PETITIONER SUCH AS N.J.S.A. 19:34-52 HAVE BEEN FOUND TO BE VIOLATIVE OF THE FIRST AMENDMENT, AND THEREFORE, UNCONSTITUTIONAL. 24

VIII. PETITIONER HAS FAILED TO OVERCOME THE PRESUMPTION OF VALIDITY THAT ATTACHES TO THE ACTIONS OF PUBLIC OFFICIALS. 27

Conclusion 28

TABLE OF AUTHORITIES

CASES

Consolidated Edison Co.
v. Public Service Commission,
447 U.S. 530, 540 (1980) 24

Cucci v. Introcaso,
218 N.J. Super. 421, 426 (1986) 16

Deamer v. Jones,
42 N.J. 516, 520 (1964) 16

Fagliarone v. Twp. of North Bergen,
78 N.J. Super. 154,155 (App. Div. 1963) 19

Farrington v. Falcey,
96 N.J. Super. 409 (App. Div. 1967) 16, 17

Goodyear Tire and Rubber Co.
v. Kin Properties, Inc.,
276 N.J. Super. 96 (App. Div. 1994),
cert. den., 139 N.J. 290 (1995) 13, 14

Harrison v. Jones,
44 N.J. Super 456 (App. Div. 1957) 17

Local 478 Trucking and Allied Industries
Pension Fund v. Jayne,
778 F. Supp. 1289 (D.N.J. 1991) 13

Matter of D.J.M.,
158 N.J. Super. 1 (App. Div. 1992),
cert. den., 130 N.J. 601 (1992) 27

Morsemere Federal Sav. & Loan Ass'n
v. Nicolaou,
206 N.J. Super. 637 (App. Div. 1986) 13

O'Neill v. Lerner,
154 N.J. Super. 317, 325 (1977) 16

Quaremba v. Allan,
128 N.J. Super. 570 (App. Div. 1974) 15, 16, 17

Reich v. City of Freeport
388 F. Supp. 953 (D.C. Ill. 1974),
aff'd 527 F. 2d 666 (1974) 9

Rogers v. State Committee of
Republican Party,
96 N.J. Super. 265, 271 (1967) 16

San Francisco County Democratic Central
Committee, et al. v. March Fong Eu, et al.,
826 F.2d 814 (9th Cir. 1987) 24, 25

Southern Burlington County N.A.A.C.P.
v. Mount Laurel Tp.,
92 N.J. 158 (1983) 27

U.S. ex rel. Pascal v. Burke,
90 F. Supp. 869 (D.C. Pa. 1950) 10

Weiss v. I. Zapinksy, Inc.,
65 N.J. Super. 351, 357 (App. Div. 1961) 19

STATUTES

28 U.S.C. § 1257(a) 9

28 U.S.C. § 1651 ..... 11, 12

N.J.S.A. 10:4-6, et seq. 20

N.J.S.A. 10:4-7 20

N.J.S.A. 10:4-8 20

N.J.S.A. 19:23-1 2

N.J.S.A. 19:23-24 2

N.J.S.A. 19:34-52 ..... 22, 24, 25

N.J.S.A. 19:49-2 ..... passim

RULES

Supreme Court Rule 14 5

Supreme Court Rule 20 ..... 11, 12

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On or about June 8, 1998, Petitioner, Diane Sank ("Petitioner") filed her initial Complaint with the Superior Court of New Jersey, Law Division, Bergen County, seeking, inter alia, nullification of the primary election held on June 2, 1998 and ordering a "New Republican Primary Election within 30 days of said Court decision at no cost to the Borough of Englewood Cliffs, New Jersey, with Petitioner and her running mate Peter Chen in Column One, with the 'Republicans for Responsible Government' designation (slogan) . . ." Petitioner seeks a "new" primary election, in compliance with the election laws of the State of New Jersey, in order to purportedly restore Petitioner's constitutional rights of due process and equal treatment under law.

Subsequently, pursuant to an Order entered by the trial court on June 19, 1998, Petitioner served a copy of her Amended Complaint in Lieu of Prerogative Writ (sic) upon counsel to Respondent, Henry Shotmeyer ("Respondent Shotmeyer") on or about June 22, 1998, and then served her Trial Brief in Support of Amended Complaint on July 7, 1998. Petitioner subsequently served her Supplemental Trial Brief in Support of Amended Complaint on July 9, 1998, two days after the deadline set forth the Court's June 19, 1998 Order.

Respondents Donovan and Shotmeyer filed their trial briefs in opposition to the relief sought by Petitioner on July 7, 1998 and July 13, 1998, respectively.

The Petitioner alleges, inter alia, that Respondents Shotmeyer and Kathleen Donovan (hereinafter "Respondent Donovan") violated certain New Jersey election laws, including N.J.S.A. 19:23-24 and N.J.S.A. 19:49-2, pertaining to the drawing for positions on primary ballots and position of candidates' names on ballots, respectively.

On July 21, 22 and 23, 1998, a trial was held before the Honorable James T. Murphy, J.S.C. After hearing Petitioner's case, the trial court dismissed Petitioner's Amended Complaint on July 23, 1998. A final order was entered on July 30, 1998.

On August 10, 1998, Petitioner filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division, requesting that the matter be heard as an emergent appeal. On August 13, 1998, with the Appellate Division's permission, the Trial Brief of Defendant, Henry Shotmeyer was submitted to the Appellate Division in lieu of a more formal appellate brief. Petitioner's application for emergent relief was denied, without opinion, by the Appellate Division on August 19, 1998.

On August 24, 1998, Petitioner filed a motion for leave to appeal from the Appellate Division's denial of her request for

emergent relief before the New Jersey Supreme Court. On September 2, 1998, Petitioner's motion was denied by the New Jersey Supreme Court, without opinion, giving rise to Petitioner's instant Petition for a Writ of Certiorari.

B. BACKGROUND

The operative, relevant facts relating to Petitioner's attempt to re-write Title 19 of the New Jersey Statutes consist of the following and are substantially not in dispute. Succinctly stated, Petitioner sought the nomination for councilperson in the Borough of Englewood Cliffs, County of Bergen, State of New Jersey in the 1998 Republican primary, ostensibly pursuant to N.J.S.A. 19:23-1, et seq. Petitioner was not the only candidate aspiring to the office of councilperson in that primary. Petitioner bracketed herself with Peter Wen Liang Chen, another candidate, for the position of Englewood Cliffs' councilperson. Opposing Petitioner and Peter Wen Liang Chen in the Republican primary were Roger Wasik and Nurhan Helvacian.

N.J.S.A. 19:49-2 provides, in pertinent part, as follows:

> ". . For the primary election for the general election in all counties where voting machines are or shall be used, all candidates who shall file a joint petition with the county clerk of their respective county and who shall choose the same designation or slogan shall be drawn for position on the ballot as a unit and shall have their names placed on the

same line of the voting machine; and provided further, that all candidates for municipal or party office in municipalities in counties where voting machines are or shall be used who shall file a petition with the clerk of their municipality bearing the same designation or slogan as that of the candidates filing a joint petition with the county clerk as aforesaid, may request that his or her name be placed on the same line of the voting machine with the candidates who have filed a joint petition with the county clerk as aforesaid by so notifying the county clerk of said county in writing within two days after the last day for filing nominating petitions and thereupon the county clerk shall forthwith notify the campaign manager of such candidates filing a joint petition as aforesaid of said request, and if the said campaign manager shall file his consent in writing with the said county clerk within two days after the receipt of said notification from said county clerk, the clerk of said county shall place the name of such candidate on the same line of the voting machine on which appears the names of the candidates who have filed the joint petition as aforesaid; provided, also, that any candidate filing a petition with the Secretary of State may request that his or her name be placed on the same line of the voting machine with the candidates who have filed a joint petition with the county clerk as aforesaid by so notifying the county clerk of said county in writing within two days after the last day for filing nominating petitions, and thereupon the county clerk shall forthwith notify the campaign manager of such candidates filing a joint petition as aforesaid of said request, and if the said campaign

> manager shall file his consent in writing with the said county clerk within two days after the receipt of said notification from said county clerk, the clerk of said county shall place the name of such candidate on the same line of the voting machine on which appears the names of the candidates who have filed the joint petition as aforesaid."

In accordance with the foregoing statute, the campaign manager of the Bergen County Republican candidates for county-wide positions, is vested with the authority to determine who will run on the county/organizational line. Respondent Henry Shotmeyer serves in the capacity as campaign manager. (July 21, 1998 Trial Transcript 63-6, July 22, 1998 Trial Transcript 85-3)[1]

As a consequence, municipal candidates, seeking the same "designation" or "slogan" on a ballot as the county-wide candidates, shall control the line through a campaign manager with regard to candidates filing a joint petition. Thus, all persons who appear on the "line" and/or "column" are permitted in that column, utilize the slogan, with the permission of the campaign manager, in this case, Respondent Shotmeyer. (July 22, 1998 Trial Transcript 85-3)

---

[1]Petitioner's Appendices fail to provide this Court with a complete record of this matter, as required by Supreme Court Rule 14. Respondent Shotmeyer relies on statements in the record, which has not been furnished by Petitioner.

On April 21, 1998, Respondent Shotmeyer identified the candidates who were to be placed within the "organizational" or "county" column. Subsequently, the Bergen County Clerk, Respondent Donovan, notified Petitioner that the organizational column was given to others, ostensibly in compliance with N.J.S.A. 19:49-2. The primary election was conducted on June 2, 1998. Petitioner, despite notification, failed to institute suit challenging, as she does here, her placement and that of her running mate on the ballot, apparently content to wait for the returns and assess her status after the votes were counted.

Petitioner filed her initial complaint on June 8, 1998, in actuality 48 days from April 21, 1998, the date when the actions occurred about which Petitioner complains. Petitioner subsequently filed her Amended Complaint in Lieu of Prerogative Writ (sic) upon counsel to Respondent, Henry Shotmeyer ("Respondent Shotmeyer") on or about June 22, 1998.

On July 21, 22 and 23, a trial was held during which the trial court found as follows:

> (i) At all relevant times, Respondent Shotmeyer served as the campaign manager for the county-wide Republican candidates. (July 23, 1998 Trial Transcript 8-10)
>
> (ii) On or about April 8, 1998, Petitioner's nominating petition was delivered to the Englewood Cliffs Municipal

Clerk, seeking the designation "Republicans for Responsible Government." (July 23, 1998 Trial Transcript 6-22)

(iii) On or about April 9, 1998, the nominating petition of candidates Roger Wasik and Nurhan Helvacian was delivered to the Englewood Cliffs Municipal Clerk, seeking the same designation. (July 23, 1998 Trial Transcript 7-1)

(iv) On or about April 16, 1998, the Municipal Clerk of Englewood Cliffs conducted a random drawing for ballot position, the results of which were that Petitioner and her running mate were chosen first.

(v) Sometime after April 16, 1998, Respondent Shotmeyer consented to Roger Wasik and Nurhan Helvacian being placed in the "organizational" column. (July 23, 1998 Trial Transcript 7-12)

(vi) Roger Wasik and Nurhan Helvacian's filing of a petition, seeking the same slogan as Petitioner and her running mate, triggered the consent of campaign manager, Respondent Shotmeyer, pursuant to N.J.S.A. 19:49-2, which allowed Respondent Shotmeyer to place the names of Roger Wasik and Nurhan Helvacian "on the same line of the voting machines on which appears the name of the

candidates who have filed joint petitions." (July 23, 1998 Trial Transcript 13-10)

(vii) The listing of county-level petitions filed for the June 2, 1998 primary (Trial Exhibit DD-1), together with the contents of the letters in the packet marked J-6 in evidence (letters from the county-wide Republican candidates designating Respondent Shotmeyer as campaign manager) satisfied the provisions relating to "joint petitions" referred to in N.J.S.A. 19:49-2. (July 23, 1998 Trial Transcript 13-20)

After hearing Petitioner's case, the trial court dismissed Petitioner's Amended Complaint on July 23, 1998. A Final Order, after hearing, was entered on July 30, 1998. As set forth above, on August 10, 1998, Petitioner filed a Notice of Appeal with the Appellate Division, requesting that the matter be heard as an emergent appeal, which request was denied on August 19, 1998. On August 24, 1998, Petitioner filed a motion for leave to appeal from the Appellate Division's denial of her request for emergent relief before the New Jersey Supreme Court, which motion was denied on September 2, 1998.

ARGUMENT

I. REVIEW OF THIS MATTER BY THE UNITED STATES SUPREME COURT IS LIMITED TO THE CONSTITUTIONAL ISSUES, IF ANY, RAISED BY PETITIONER.

In her Statement of Jurisdiction, Petitioner states that the jurisdiction of this Court rests and is invoked under 28 U.S.C. § 1257(a), which states as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by a writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." (emphasis added.)

28 U.S.C. § 1257(a) clearly defines the parameters of this Court's review of final judgments or decrees rendered by the highest court of a State. Review is limited to instances where the validity of a State statute is drawn into question on the grounds that it is unconstitutional. See, Reich v. City of Freeport, 388 F. Supp. 953 (D.C. Ill. 1974), aff'd 527 F. 2d 666 (1974); see also,

U.S. ex rel. Pascal v. Burke, 90 F. Supp. 869 (D.C. Pa. 1950).

In her Petition, however, Petitioner goes to great lengths to describe the alleged violations of New Jersey election laws and the New Jersey Open Public Meetings Act by Respondents Shotmeyer and Donovan, all of which are issues determined under state, and not federal, law. In fact, the only ostensible federal question raised by Petitioner is in the last point of her Petition where she questions the constitutionality of one section of the New Jersey election statutes.

With respect to Respondent Shotmeyer, the issues raised by Petitioner are issues which have been properly decided by the New Jersey Courts in accordance with New Jersey State law, and thus, are not properly before this Court.

II. PETITIONER HAS FAILED TO PROPERLY APPLY TO THIS COURT FOR AN EXTRAORDINARY WRIT, AND AS SUCH HER THIS CASE SHOULD NOT BE DEEMED AS AN APPLICATION FOR AN EXTRAORDINARY WRIT.

In Point II of her Petition, Petitioner contends that her petition satisfies the requirements for an "Extraordinary Writ", pursuant to 28 U.S.C. § 1651(a), which states:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Despite her contentions, Petitioner concedes that she has failed to properly apply for an "Extraordinary Writ" pursuant to the Supreme Court Rules.

Specifically, Supreme Court Rule 20 governs the issuance of Extraordinary Writs authorized by 28 U.S.C. § 1651. As stated in Rule 20, issuance of such writs is "not a matter of right, but of discretion sparingly exercised." It must be shown that the writ "will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or in any other court." A petition seeking an extraordinary writ must be prefaced by a motion for leave to file

for such a writ. See, Supreme Court Rule 20.2. The requirements for filing such a motion are clearly and unambiguously set forth in Rule 20.2.

Although Petitioner concedes at the outset of her argument that she has not properly filed for an Extraordinary Writ, she requests that her case be given consideration "as representative of a situation akin to Rule 20: Extraordinary Writ".

Accordingly, Petitioner should not be permitted to disregard the process established for applying for an Extraordinary Writ, pursuant to 28 U.S.C. § 1651 and Supreme Court Rule 20, and then simultaneously request that this Court give her case the same consideration as an Extraordinary Writ.

III. THE EQUITABLE DOCTRINES OF WAIVER, ESTOPPEL AND LACHES BAR PETITIONER FROM THE RELIEF SOUGHT.

In Point III of her Petition, Petitioner provides various citations of cases which were heard by the New Jersey Superior Court, Appellate Division and New Jersey Supreme Court on emergent or accelerated bases. While Respondent Shotmeyer does not dispute the ability of the New Jersey courts to hear emergent appeals, Petitioner fails to provide any reasons as to why her case merits an emergent appeal.

To the contrary, the facts of this case indicate that Petitioner stood idly by during the ballot positioning process. Where has the Petitioner been since she became aware, obviously before the primary election was held, of her position on the ballot? Apparently, Petitioner was content to wait and see how the primary election would turn out before she decided to take issue with the ballot configuration and line on which she ultimately appeared. Since Petitioner seeks equity, Petitioner must "do" equity. See, Morsemere Federal Sav. & Loan Ass'n v. Nicolaou, 206 N.J. Super. 637 (App. Div. 1986); see also, Local 478 Trucking and Allied Industries Pension Fund v. Jayne, 778 F. Supp. 1289 (D.N.J. 1991). Equity is to aid the vigilant and not to reward parties who engage in "spectator" conduct. See, Goodyear Tire and Rubber Co. v. Kin Properties, Inc., 276 N.J.

Super. 96 (App. Div. 1994), cert. den., 139 N.J. 290 (1995). The Petitioner waited to see if she would benefit from the election, and is only before the Court now because she lost the election and wants to change the end result, after the will of the electorate has been expressed. It is the safe assumption that Petitioner would not have sought relief had she won the election. The Petitioner was not vigilant when she chose to sit on her hands at the time the ballots were first configured; accordingly, she should not be heard now to complain.

IV. THE NEW JERSEY COURTS CORRECTLY HELD THAT RESPONDENT SHOTMEYER ACTED PURSUANT TO THE PROTOCOL PRESCRIBED IN N.J.S.A. 19:49-2, THEREBY BARRING THE RELIEF SOUGHT BY PETITIONER.

Petitioner also asserts that Respondent Shotmeyer exceeded his statutory authority by designating candidates other than the Petitioner to appear on the "organizational line", thereby allegedly violating New Jersey election laws and causing Petitioner irreparable harm by denying her a fair election. However, the relevant sections of Title 19 of the New Jersey Statutes actually operate to defeat Petitioner's allegations.

It is respectfully submitted that Petitioner's allegations with respect to Respondent Shotmeyer are based on the erroneous thesis that the municipal clerk's drawing for positions on the primary ballot is immutable. In fact, Petitioner simply ignores Respondent Shotmeyer's status as campaign manager and the protocol for ballot designation embodied in N.J.S.A. 19:49-2. [July 21, 1998 Trial Transcript 63-6, July 22, 1998 Trial Transcript 84-1 (referring to Trial Exhibit J-6)]

It is well settled law that the County Clerk is afforded wide discretion in setting up the ballot, and courts should not interfere with the exercise of that discretion unless it is clearly unreasonable. Quaremba v. Allan, 128 N.J. Super. 570 (App. Div.

1974); see also Farrington v. Falcey, 96 N.J. Super. 409 (App. Div. 1967). Furthermore, the New Jersey Supreme Court has held that "[c]ourts are reluctant to interfere in intra-party controversies in absence of a violation of a controlling statute or infringement of a clear legal right." Rogers v. State Committee of Republican Party, 96 N.J. Super. 265, 271 (1967); citing Deamer v. Jones, 42 N.J. 516, 520 (1964); see also O'Neill v. Lerner, 154 N.J. Super. 317, 325 (1977). Here, the clear legal and time-settled rights are reposed with Respondents Donovan and Shotmeyer.

The New Jersey Supreme Court in Deamer, supra., held that statutes relating to the organization of a political party "were not intended to create pervasive regulation of intra-party operations and procedures." Deamer at 521. "In becoming the arbiters of political strife, the courts would lose their neutral status as the upholders of the law." Cucci v. Introcaso, 218 N.J. Super. 421, 426 (1986); also citing Deamer at 521.

With respect to Petitioner's equal protection claims, in Quaremba, the New Jersey Supreme Court recognized that grouping candidates could result in giving certain candidates a preference, yet the Court upheld the constitutionality of N.J.S.A. 19:49-2, stating:

> "it affords no basis for invalidating as unreasonable the legislative determination that whatever the effect on an unaffiliated candidate, the public

> interest is better served by permitting a grouping of candidates having common aims or principles and authorizing those candidates 'to have this fact brought to the attention of the voter in a primary election with the additional effectiveness produced by alignment of their names on the machine ballot. . ." citing, Harrison v. Jones, 44 N.J. Super 456 (App. Div. 1957).

Quaremba v. Allan, 67 N.J. 1 (1975).

The Court in Quaremba also discussed Farrington v. Falcey, 96 N.J. Super. 409 (App. Div. 1967), where it appeared that the campaign manager for a group of Democratic candidates for county office had consented to the affiliation with that group of two candidates for the Democratic nominations for State Senators. The campaign manager had refused Farrington's request for such affiliation, who also was a candidate for nomination as a State Senator. The trial court in Farrington ordered the county clerk to place Farrington's name on the same line as the group. The Appellate Division, held that N.J.S.A. 19:49-2 barred the relief granted by the trial court and that even if the county clerk had the discretion to grant Farrington's request, it was not an abuse of power to deny such a request.

In this case, N.J.S.A. 19:49-2 permitted Respondent Shotmeyer, in his role as campaign manager, to "file his consent" with regard to the "organizational" line. (July 21, 1998 Trial

Transcript 63-6) Accordingly, Respondent Shotmeyer, acting in that capacity, and in accordance with the protocol set forth by N.J.S.A. 19:49-2, designated candidates other than Petitioner (specifically, Roger Wasik and Nurhan Helvacian) to appear on the "organizational" line, and thus, to utilize the slogan "Republicans for Responsible Government". The Petitioner was subsequently placed in the appropriate column and accordingly notified by Respondent Donovan.

The Petitioner's argument that Respondent Shotmeyer did not possess documentation from municipal candidates, appointing him as their campaign manager is irrelevant. Pursuant to N.J.S.A. 19:49-2, Respondent Shotmeyer may, as campaign manager for the county-wide Republican candidates, provide his consent to municipal candidates who seek placement in the "organizational" column, along with those candidates who have filed "joint petitions" (in this case, the county-wide candidates). The trial court found that the listing of county level petitions filed for the June 2, 1998 primary, together with the packet of letters from the county-wide Republican candidates designating Respondent Shotmeyer as campaign manager, satisfied the provisions relating to "joint petitions" referred to in N.J.S.A. 19:49-2. (July 23, 1998 Trial Transcript 13-20) Respondent Shotmeyer communicated his consent to place Roger Wasik and Nurhan

Helvacian in the "organizational" column with the candidates who filed "joint petitions" (the county-wide candidates), in accordance with the statute.

At all relevant times, both Respondents Donovan and Shotmeyer acted within the boundaries prescribed by the statute. Accordingly, the trial court's findings should not be disturbed unless they are supported by relevant and credible evidence. Fagliarone v. Twp. of North Bergen, 78 N.J. Super. 154,155 (App. Div. 1963); citing, Weiss v. I. Zapinksy, Inc., 65 N.J. Super. 351, 357 (App. Div. 1961).

V. PETITIONER'S RELIANCE ON THE OPEN PUBLIC MEETINGS ACT, N.J.S.A. 10:4-6, ET SEQ., IS THOROUGHLY MISPLACED AND IMPROPER, THEREBY BARRING PETITIONER'S REQUEST FOR RELIEF UNDER THE ACT.

In Point VI of her Petition, Petitioner asserts that Respondents Shotmeyer and Donovan violated the Open Public Meetings Act, N.J.S.A. 10:4-6, et seq., when Respondent Shotmeyer met with Respondent Donovan to communicate his consent with regard to the "organizational" line.

N.J.S.A. 10:4-7 defines the right of the public with respect to public meetings as follows:

> "the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion." (emphasis added)

N.J.S.A. 10:4-8 defines a public body as follows:

> "'Public body' means a commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this State, and collectively empowered as a voting body to perform a public governmental function

> affecting the rights, duties, obligations, privileges, benefits, other legal relations of any person, or collectively authorized to spend public funds including the Legislature." (emphasis added)

In this case, Respondent Shotmeyer met with Respondent Donovan to indicate his consent with regard to candidates appearing on the "organizational" line, in accordance with his statutorily prescribed duties as campaign manager for the county-wide candidates. The Petitioner fails to recognize that Respondents Shotmeyer and Donovan did not, individually or collectively, constitute a "public body" as contemplated by the Open Meetings Act. Clearly, Respondents Shotmeyer and Donovan were not "collectively empowered as a voting body", and therefore, the Open Public Meetings Act simply does not apply to this matter.

VI. RESPONDENT SHOTMEYER ACTED IN ACCORDANCE WITH HIS DUTIES AS THE CAMPAIGN MANAGER FOR REPUBLICAN COUNTY-WIDE CANDIDATES, AND THEREFORE, HIS ACTIONS DID NOT CONSTITUTE AN IMPROPER ENDORSEMENT OF ANY CANDIDATE PRIOR TO THE PRIMARY ELECTION BY A POLITICAL PARTY OR COMMITTEE.

In Point VII of her Petition, Petitioner contends that Respondent Shotmeyer improperly endorsed a candidate prior to the primary election, in violation of N.J.S.A. 19:34-52. Succinctly stated, the Petitioner alleges that by affording the "organizational" line to candidates Nurhan Helvacian and Roger Wasik, Respondent Shotmeyer effectively endorsed their candidacies, in violation of N.J.S.A. 19:34-52. However, aside from pointing out that Respondent Shotmeyer is the Chairman of the Bergen County Republican Organization and the campaign manager for the county-wide Republican candidates, Petitioner fails to support her allegations of illegal endorsement.

The Petitioner repeatedly fails to recognize that Respondent Shotmeyer was acting in accordance with his statutorily (N.J.S.A. 19:49-2) prescribed duties as campaign manager when he identified the candidates to appear in the "organizational" column. (July 21, 1998 Trial Transcript 63-6, July 22, 1998 Trial Transcript 85-3) At no time did Respondent

Shotmeyer endorse any candidate in his capacity as the Chairman of the Bergen County Republican Organization. The Petitioner has failed to demonstrate any legally incorrect conduct on the part of Respondent Shotmeyer. Accordingly, Petitioner's lengthy description of the similarities between the Bergen County Republican Organization and the Republican County Committee on appeal is irrelevant, since Respondent Shotmeyer acted within the scope of his statutory duties, as the campaign manager for the county-wide Republican candidates.

VII. STATUTES RELIED UPON BY PETITIONER SUCH AS N.J.S.A. 19:34-52 HAVE BEEN FOUND TO BE VIOLATIVE OF THE FIRST AMENDMENT, AND THEREFORE, UNCONSTITUTIONAL.

Statutes such as N.J.S.A. 19:34-52, which prohibit political parties from endorsing candidates prior to primary elections, have been found to be violative of the First Amendment, and therefore, unconstitutional. For example, in San Francisco County Democratic Central Committee, et al. v. March Fong Eu, et al., 826 F.2d 814 (9th Cir. 1987), the United States Court of Appeals for the Ninth Circuit held that Section 11702 of the California Election Code, which banned pre-primary endorsements by political parties, violated the First Amendment. The Ninth Circuit held that "[b]ecause section 11702 prohibits political speech, the inviolability of which rests at the core of the First Amendment . . . we must subject the section to strict scrutiny." Id. at 833. In applying the "strict scrutiny" test, the Ninth Circuit set forth that "[f]inally, 'the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving' its interests". Id. at 834; citing Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 540 (1980). The State of California, in March Fong Eu, asserted that the ban on endorsements protected political parties from internal

factionalism and protected party members from undue influence when they voted in the primary elections. The Ninth Circuit went on to reject both of the arguments offered by the government, holding that "[p]olitical parties are entitled to decide for themselves whether making preprimary endorsements creates disruption that hurts the parties' chances in the general election." Id. at 834. The Ninth Circuit also held that "[w]e cannot accept the State's claim that denying the voters access to the views of party leadership somehow enhances their First Amendment rights." Id. at 835. In striking down the statute, the Ninth Circuit stated: "Prohibiting the governing body of a political party from supporting some candidates and opposing others patently infringes both the right of the party to express itself freely and the right of the party members to an unrestricted flow of political information." Id.

While Respondent Shotmeyer recognizes that the constitutionality of N.J.S.A. 19:34-52 is not at issue in this case, it is important to note that the statute, so heavily relied upon by the Petitioner, suffers from the same constitutional infirmities of a sister-state's comparable statute held unconstitutional by the United States Court of Appeals for the Ninth Circuit.

In this case, the county-wide Republican candidates designated Respondent Shotmeyer, Chairman of the Bergen

County Republican Organization, to serve as their campaign manager. (July 21, 1998 Trial Transcript 63-6) Respondent Shotmeyer subsequently identified which candidates would appear in the "organizational" column in accordance with his statutorily (N.J.S.A. 19:49-2) prescribed duties as campaign manager, and not as Chairman of the Bergen County Republican Organization. Therefore, the county Republican party did not endorse any candidates when Respondent Shotmeyer acted as the campaign manager; indeed the party was not implicated at all.

VIII. PETITIONER HAS FAILED TO OVERCOME THE PRESUMPTION OF VALIDITY THAT ATTACHES TO THE ACTIONS OF PUBLIC OFFICIALS.

A presumption of validity attaches to the actions of public officials. That presumptive validity is justified by the fact that public officials generally act within the powers granted to them and do so properly. See, Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983). Public officials are assumed to properly perform their respective functions, and good faith in public officials is to be presumed. See, Matter of D.J.M., 158 N.J. Super. 1 (App. Div. 1992), cert. den., 130 N.J. 601 (1992).

In this case, Respondents Shotmeyer and Donovan were, at all relevant times, acting within their statutorily prescribed duties, and as such the validity of such actions is to be presumed.

CONCLUSION

For the foregoing reasons, the Petitioner's Petition for a Writ of Certiorari should be denied.

SINISI & SPROVIERO
Attorneys for Respondent,
Henry Shotmeyer

By:
Stephen P. Sinisi

DATED: December 31, 1998